STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. R-04/09-227
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Economic Services Division computing his patient share allowance for long-term care Medicaid. The issue is whether the petitioner should be allowed a deduction from his income in the amount he pays in alimony each month to his ex-wife. The following facts are not in dispute.

FINDINGS OF FACT

1. The petitioner is eighty-four and has been a resident of a nursing home in Rutland, Vermont since 2004, and he has been found eligible by the Department for long-term care Medicaid.

2. The petitioner's gross monthly income consists of a Social Security benefit of $1,609.20.

3. The petitioner was divorced from his ex-wife in Florida in 2000, where his ex-wife still resides.

4. At the time of his divorce the petitioner was ordered by the Florida court to pay $505.30 per month in alimony. The court ordered that this amount to be "garnished" from the petitioner's Social Security check.

5. The Department was unaware of this garnishment until March 2009. Prior to that time, the Department computed the petitioner's patient share for his nursing home expenses based on the *net* amount of his Social Security benefit, which did not include the alimony deduction. When it learned of the garnishment the Department notified the petitioner that his patient share would increase by this amount. In its decision dated April 3, 2009 (effective May 1, 2009) the Department did not deduct petitioner's alimony payments from the amount of his income which must be paid directly to the nursing home as his patient share. The only amounts now deducted from the petitioner's income by the Department in its determination of his patient share are his personal needs allowance of $47.66 per month and his Medicare Part B premium of $96.40 per month.

ORDER

The Department's decision is affirmed.

REASONS

The petitioner raises questions regarding the Department's treatment of monies directly paid to his ex-wife from his Social Security benefits. The Department considers these monies as available to the petitioner and bases its determination of petitioner's patient share on the inclusion of these monies in computing his income.

The federal Medicaid Act directs states to only consider income and resources that are available to the applicant or recipient. 42 U.S.C. § 1396a(a)(17)(B). Available income is not defined. Congress gave the Agency of Health and Human Services authority to develop regulations and interpret the meaning of "available income".

The federal regulations addressing deductions from income are found at 42 C.F.R. §§ 435.725(c) and 435.726(c). These regulations set out certain required deductions from income including a personal needs allowance, maintenance needs for spouse, maintenance needs of family, and expenses for medical care not subject to third party payment. An optional deduction for home maintenance allowance is found in 42 C.F.R. § 435.725(c)(5).

Vermont has adopted regulations that mirror the federal regulations. The applicable regulations are found at M430 *et*

seq. M430 provides that the Department determine patient share by computing a recipient's income and then deducting allowable expenses. The allowable deductions are found in M432 and include:

> (a) a personal needs allowance or community maintenance allowance (M432.1);
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> (b) home upkeep expenses, if applicable (M432.2);
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> (c) allocations to community spouse or maintenance needs of family members living in the community, if applicable (M432.3); and
>
> (d) reasonable medical expenses incurred, if applicable (M420-M422).

In petitioner's case, he was granted the personal needs allowance and a medical expense deduction for his Medicare Part B payment. The community spouse allocation does not apply to ex-spouses. The Department sought guidance from the Centers for Medicare and Medicaid Services who confirmed that alimony is not an allowable deduction from income for the purposes of determining patient share.[1]

The Board dealt with the same issue in Fair Hearing No. 17,681. The facts were similar to this case. The petitioner's court-ordered alimony and patient share were greater than his total income. The Board affirmed the

Department and found there was no basis to disregard the applicable regulations that did not allow alimony payments as deductions. Implicit in this decision is an understanding that alimony, like child support, can be reduced or negated when there is a real and unanticipated change of circumstances such as reduced income or receipt of public benefits. 15 V.S.A. §§ 660 and 758.

It should be noted that a relatively recent decision by the South Dakota Supreme Court leads to a different result. Mulder v. South Dakota Department of Social Services, 675 N.W.2d 212 (2004). Mulder's sole source of income was Social Security deposited into his bank account after Medicare Part B was deducted. Pursuant to a divorce order, the bank automatically transferred funds to his ex-wife's account. The monies were designated alimony because federal law prevented taking a portion of social security benefits as property division. The South Dakota eligibility regulations (incorporating SSI regulations) were not fully incorporated into their benefits calculation (patient share) regulations. As a result, the court found South Dakota's use of the

[1] The Department requested information from a number of states asking whether they granted a deduction for alimony. None of the states the Department contacted allowed a deduction for alimony.

eligibility calculations when determining the amount of patient share to be arbitrary and unreasonable. The Court determined that counting alimony as part of available income was not reasonable.

However, other Courts have reached opposite conclusions when determining whether court ordered support should be considered available income under the Medicaid statute. Peura by and through Herman v. Mala, 977 F.2d 484 (9th Cir. 1992) (Alaska regulation allowed state to consider part of child support order as available income. Peura wanted his entire child support obligation to be deemed unavailable income. Court held that Alaska's regulation allowing a portion of child support payments to be considered available income did not contravene federal Medicaid Act. The Court gave deference to the federal Health and Human Service's interpretation that child support is available income). Emerson v. Steffen, 959 F.2d 119 (8th Cir.992) (Interpretation of court ordered support payments permissible under federal Medicaid Act. The Court gave deference to federal interpretation that court ordered support is available income.). Himes v. Sullivan, 806 F. Supp. 413 (W.D.N.Y. 1992) (Dismissing challenge to interpretation that court ordered support is available income.).

In this case the petitioner argues that he does not have the financial means to pursue a modification of his divorce decree in Florida, which he argues would be necessary to end the garnishment of alimony payments from his monthly Social Security check. Thus, the petitioner argues, he is in a "Catch-22" in that he does not and, allegedly, cannot receive enough income to pay his patient share, and is incurring an increasing debt to the nursing home each month in the amount of his patient share that constitutes his garnished alimony payment.

Based on the facts alleged by the petitioner, however, it cannot be concluded that he has exhausted all reasonable potential remedies for his situation. First, he may well be eligible for free legal services to pursue a modification of his divorce decree in Florida. There is also no indication that he could not negotiate with the nursing home for *its* assistance in pursuing this remedy (something that would appear to be very much in its self-interest, especially since its failure to do so might well constitute a "lack of mitigation" defense for the petitioner if it were ever to take legal action against him for nonpayment of this portion of his bill).

Petitioner in this case was subject to a divorce order entered eight years ago. It can be assumed that the order reflects what the court considered fair at that time. However, circumstances have drastically changed. Petitioner is now in a nursing home and his income is insufficient to pay both his patient share and alimony. Unless and until the petitioner can demonstrate that he has exhausted all seemingly-available potential avenues to end his alimony payments, it must be concluded that the Department's decision in this matter is clearly and reasonably in accord with the above regulations. Thus, the Board is bound by law to affirm. 3 V.S.A. 3091(d), Fair Hearing Rule No. 1000.4D.

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